APPENDIX

GUIDES FOR ADVERTISING ALLOWANCES AND OTHER MERCHANDISING PAYMENTS AND SERVICES; COMPLIANCE WITH SECTIONS 2(d) AND 2(e) OF THE CLAYTON ACT, AS AMENDED BY THE ROBINSON-PATMAN ACT

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1. *When does the law apply?* Sections 2 (d) and (e) apply to a seller of products in interstate commerce, if he either (a) pays for services or facilities furnished by his customers in connection with the distribution of his products [Section 2(d)], or (b) furnishes such services or facilities to his customers [Section 2(e)].

2. *Who is a seller?* "Seller" includes anyone who sells products for resale, with or without further processing. Selling corn syrup to a candy manufacturer is an example of a sale for resale with processing.

3. *Who is a customer?* A "customer" is someone who buys directly from the seller or his agent or broker. Sometimes someone who buys from the customer may have such a relationship with the seller that the law also makes him a customer of the seller. In these Guides, the word "customer" which is used in Section 2(d) of the law includes "purchaser" which is used in Section 2(e).

4. *What is interstate commerce?* This is something that whole law books have been written about; you cannot define it in a few words. Legal decisions tend to interpret the term quite broadly. If there is any part of a business which is not wholly within one

state, (for example, sales or deliveries of products, their subsequent distribution or purchases or deliveries of supplies or raw materials), the business may be subject to the Robinson-Patman Act. Sales in the District of Columbia are also covered by the law.

5. *What are services or facilities?* This term has not been exactly defined by the statute or in decisions. The following are merely examples—the law also covers other services and facilities.

(a) The following have been held to be services or facilities covered by the law where the seller has paid the buyer for furnishing them: Any kind of advertising, handbills, window and floor displays, special sales or promotional efforts for which "push money" is paid to clerks, salesmen, and other employees of the customers, demonstrators and demonstrations, collecting of orders from individual stores, furnishing complete distribution of seller's line.

(b) Here are some examples that have been held to be services or facilities covered by the law when the seller furnished them to a customer: Any kind of advertising, catalogs, demonstrators, display and storage cabinets, display materials, special packaging, or package sizes, warehouse facilities, accepting returns for credit, prizes or merchandise for conducting promotional contests.

In these Guides, the term "services" is often used as short for "services and facilities."

6. *Need for a plan.* If a seller makes payments or furnishes services that come under these sections, he must do it under a plan that meets several requirements. Although this plan need not be written or formal, this may be advisable, particularly if there are many competing customers to be considered or if the plan is at all complex.

Briefly, the requirements are:

(a) The payments or services under the plan must be available on a proportionally equal basis to all competing customers. (See paragraph 7)

(b) The seller should take some action to inform all of his customers who compete with any participating customer that the promotion is available. (See paragraph 8)

(c) The plan must either allow all types of competing customers to participate or provide some other means of participation for those who cannot use the basic plan. (See paragraph 9)

(d) The seller and customer should have a clear understanding about the exact terms of the offer and the conditions upon which payments will be made for services and facilities furnished. (See paragraph 10)

(e) The seller must take reasonable precautions to see that the services are actually furnished and also that he is not overpaying for them. (See paragraph 11)

7. *Proportionally equal terms.* The payment or services under the plan must be made available to competing customers on proportionally equal terms. This means that payments or services must be proportionalized on some basis that is fair to all customers who compete. No single way to proportionalize is prescribed by law. Any method that treats competing customers on proportionally equal terms may be used. Generally, this can best be done by basing the payments made or the services furnished on the dollar volume or on the quantity of goods purchased during a specified time.

Example: A seller may properly offer to pay a specified part (say 50%) of the cost of local newspaper advertising up to an amount equal to a set percentage (such as 5%) of the dollar volume of purchases during a specified time.

Example: A seller may properly place in reserve a specified amount of money for each unit purchased, and use it to reimburse customers for newspaper advertising when they prove they have advertised.

Example: A seller may not select one or a few customers to receive special allowances to promote his product, because of their special reputation, without making those allowances available on proportionally equal terms to other customers who compete with them.

Example: A seller's plan may not provide an allowance on a basis that has rates graduated with the amount of goods purchased, as, for instance, 1% of the first $1,000 purchases per month, 2% of second $1,000 per month, and 3% of all over that.

8. *Seller's duty to inform.* The seller should take some action to inform all his customers competing with any participating customer that the plan is available. He can do this by any means he chooses, including letter, telegram, notice on invoices, salesmen, brokers, etc. However, if a seller wants to be able to show later that he did make an offer to a certain customer, he is in a better position to do so if he made it in writing.

9. *Covering all competing customers.* The plan must allow all types of competing customers to participate. It must not be tailored to satisfy the needs of a favored customer or class, but must be suitable and usable under reasonable terms by all competing customers. This may require offering all customers more than one way to participate in the plan. The seller cannot either expressly, or by the way the plan operates, eliminate some competing customers. Where the seller has alternative promotional plans, his customers must be given the opportunity to choose among the plans.

Example: S offers a plan for cooperative advertising on radio, television or in a newspaper. Some of his customers who compete with those who receive the allowance are too small to use the offer. He must offer them some usable and proportional alternative, such as advertising in a neighborhood paper, handbills, etc. (See Guide 7)

Example: The seller's plan provides for furnishing demonstrators to large department store customers. He must provide usable alternatives to his customers who run other types of stores and compete with these customers but cannot use demonstrators. The alternatives might be services of equivalent value that the competing customers could use, or payments of like value for advertising or displays furnished by the customers. (See, also, Guide 7)

Example: A seller of appliances makes his plan available only to those customers purchasing at least some minimum number (such as eight) of his appliances in a single order or a stated period. If this requirement is beyond the reach of some customers competing with those participating in the promotion, it may be illegal.

Example: A seller should not refuse advertising allowances to those who advertise the seller's products at prices below a given figure, where this may be a means of fixing prices illegally.

10. *Need to understand terms.* There should be a clear understanding between the seller and each participating customer as to the exact terms of the offer and the conditions upon which payments will be made for service and facilities furnished.

11. *Checking customer's use of payments.* The seller must take reasonable precautions to see that the services he is paying for are furnished and also that he is not overpaying for them. Moreover, the

customer must expend the value received in full solely for the purpose for which the allowances were given. If the seller knows or should know that what he pays or furnishes is not being properly used, the payments or services must be discontinued. It should be noted that payments by the seller where the customer performs no services may result in legal action against the seller under Section 2(a) of the Robinson-Patman Act and against the customer under Section 2(f) of that law. Likewise, a seller may not properly pay, nor may a customer properly receive and retain, any amount in excess of that actually used by the customer to perform the service.

12. *Competing customers.* The seller is required to provide in his plan only for those customers who compete in the distribution of the promoted product with the customer who is participating in the promotion. Therefore, the seller can limit the area of his promotion to that in which participating customers sell.

Example: Manufacturer A, located in Wisconsin and distributing shoes nationally, sells shoes to three retailers who sell only in Roanoke, Virginia, and compete with each other there. He has no other customers selling in Roanoke or its vicinity. If he offers his promotion to one Roanoke customer he must include all three, but can limit it to them.

Example: Manufacturer A distributes his products nationally. He may lawfully engage in a special promotional campaign in the New England states without making the same program available to customers in the remainder of the country who do not compete with New England customers.

Note: The seller must be careful here not to discriminate against customers located on the fringes but outside the area selected for the special promotion,

since they may be actually competing with those participating.

13. *Indirect payments.* Promotional assistance plans are sometimes devised and/or administered by third parties who are neither suppliers nor customers. The fact that a promotional assistance plan is thus devised and/or administered in no way insulates suppliers or customers from the requirements of the statute. Furthermore, the third party or intermediary may himself be liable if the use or administration of the plan results in violation of the law.

Example: A seller may not buy advertising time from a radio station that is furnishing free radio time to certain favored customers of the seller because the customers run an in-store promotion of the seller's goods.

Sellers or intermediaries contemplating the use of such tri-partite promotional plans may obtain an advisory opinion concerning the legality of a specific, proposed plan by submitting a request, together with complete details of the proposed plan, to the Secretary, Federal Trade Commission, Washington, D.C. 20580. Assistance with respect to existing plans may be obtained by writing to the Commission's Bureau of Industry Guidance.

14. *Meeting competition in good faith.* A seller charged with discrimination in violation of Section 2(d) or Section 2(e) may defend his actions by showing that the payments were made or the services were furnished in good faith to meet equally high payments or equivalent services paid or furnished by a competitor. However, this is a very technical defense subject to important limitations.

15. *Cost justification.* It is no defense to a charge of unlawful discrimination in the payment of an allowance or the furnishing of a service for a seller to

show that such payment, service, or facility, could be justified through savings in the cost of manufacture, sale or delivery.

16. *Customer's liability.* Sections 2 (d) and (e) apply only to sellers and not to customers. However, a customer who knows or has reason to know that he is receiving payment or service granted or furnished when the seller violates Sections 2 (d) or (e) may also be proceeded against by the Commission under Section 5 of the Federal Trade Commission Act, which prohibits unfair methods of competition.

Example: Buyer "A" actively solicits his suppliers to purchase advertising in connection with an anniversary sale or new store opening knowing or having reason to believe that such payments are not made under the seller's regular cooperative advertising program and that they are not offered to competing customers.

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